

SIGNED.



Dated: September 10, 2009


JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:) Chapter 11
MURPHY RAY KITTRELL, JR.,) No. 4:09-bk-08537-JMM
)
) **MEMORANDUM DECISION (Re: Stay**
) **Relief Requested by M&I Marshall**
) **& Ilsley Bank)**
Debtor.)

Before the court are two requests for stay relief filed by M&I Marshall & Ilsley Bank, NA (M&I) (DN 21 and DN 23). An evidentiary hearing was held on September 8, 2009, at which time the court considered evidence and argument. The court now rules.

FACTS

A. Coyote Lane Property

M&I is the owner and holder of two promissory notes executed by the Debtor, each of which is secured by separate parcels of real property, one in Tucson and one in Scottsdale.

The property which is located in Tucson is at 10333 N. Coyote Lane, Tucson, Arizona, and is also known as Tax Parcel 216-33-0870. That obligation has been in monetary default since September, 2008. The balance due thereon, as of the filing of the bankruptcy petition on April 27, 2009, was \$341,052.82 (Ex. 1, Affidavit of Margaret Fank).

1 The real property securing the debt is valued at \$300,000 (Ex. 3, Affidavit of William
2 Dalton).

3 Thus, there is no equity in the property, as the debt exceeds the property's value.

4 The Debtor's plan calls for the Debtor to complete construction, estimated to cost
5 \$53,000 (Ex. C), after which the Debtor's plan proposes, over a five-year period, to either sell or
6 refinance the property for an amount greater than required to pay off the M&I loan, the \$53,000
7 construction loan, and return a profit to the Debtor.

8 The Debtor presented no evidence that the \$53,000 construction loan was in process
9 or viable, nor that even if accomplished, that the property would increase in value sufficient to meet
10 his expectations. Nor did the Debtor present any evidence, other than his optimism, that the current
11 dire economic condition would improve over time, and what that time frame would be.

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13 **B. Lot 253, Estancia, Tax Parcel 216-84-231 5**
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15 M&I's balance on this secured obligation, on the petition date, was \$821,783.59
16 (Ex. 1). That property was appraised at \$550,000, as of June 19, 2009 (Ex. 2). The loan has been
17 in monetary default since May, 2008. Thus, there is no equity in the property securing the debt.

18 As with the Coyote Lane property, the Debtor proposes to borrow \$1.3 million to
19 construct a home on the property (Ex. B). However, the proposed lender, Baron Financial, L.L.C.,
20 has not issued a legally binding letter of commitment (Ex. D), nor, as Mr. Greg Theisen testified,
21 would it do so without a current appraisal which would justify lending \$1.3 million against a
22 property encumbered by a \$821,000 first priority lien.

23 As with Coyote Lane, the Debtor argued that Arizona real estate values would
24 increase, over the time allotted for the plan, to enable him to sell or refinance the property for
25 enough to pay off M&I, the construction loan, and return a profit. No evidence was presented to
26 credibly support that assumption.

1 **THE LAW**

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3 No equity currently exists in either property. 11 U.S.C. § 362(d)(2)(A). In addition,
4 no evidence was presented to support the argument that the reorganization plan envisioned by the
5 Debtor is feasible. In fact, upon the evidence provided by the Debtor, although his plan is
6 optimistic, in the end, it is only speculative and offers his best guess as to the future of Arizona's real
7 estate economy. A reorganization court cannot confirm a speculative plan. *In re Acequia*, 787 F.2d
8 1352, 1364 (9th Cir. 1986); 11 U.S.C. § 362(d)(2)(B).

9 M&I carried its burden of proof that no equity exists in the subject properties, but the
10 Debtor failed to carry his burden that his proposed plan is "effective," which means feasible.
11 11 U.S.C. § 362(g).

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13 **RULING**

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15 Therefore, the court is bound to grant the relief from the automatic stay in favor of
16 M&I, as to both properties. A separate order will be entered which lifts the automatic stay as to
17 10333 N. Coyote Lane, Tucson, Arizona, and also as to Lot 253, Estancia, Scottsdale, Arizona.

18
19 DATED AND SIGNED ABOVE.

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21 COPIES to be sent by the Bankruptcy Notification
22 Center ("BNC") to the following:

23 Murphy Ray Kittrell, Jr., Debtor

24 Eugene F. O'Connor, Attorney for M&I Marshall & Ilsley Bank, NA

25 Office of the U.S. Trustee
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